U.S.

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IN THE

Supreme Court of the United States

TRAVIS WILLARD BALLARD,
Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

Petition for a Writ of Certiorari to the Michigan Court of Appeals

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Can a defendant be convicted of carrying a concealed weapon when the prosecution offered no evidence establishing the statutory elements required to prove the existence of such weapon?

When no gun was recovered or observed being fired and when the only evidence offered in a criminal prosecution for carrying a concealed weapon is testimony from one witness who stated that she was not positive that the defendant had a gun in his possession, does reasonable doubt exist as a matter of law?

Can a criminal conviction stand when the prosecution has failed to prove every essential element of the crime charged beyond a reasonable doubt?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are identified in the caption.

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IN THE

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No. ____

TRAVIS WILLARD BALLARD,
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Petition for Writ of Certiorari to the Michigan Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

PETITION FOR CERTIORARI

Petitioner, Travis Willard Ballard, respectfully petitions for a writ of certiorari to review the opinion of the Michigan Court of Appeals in this case.

OPINIONS BELOW

1. On April 12, 2002, Lenawee Circuit No. 01-9495-FH a judgment of conviction was entered against Petitioner Travis Ballard, an attorney, who was found guilty by a jury on three counts, to wit: one felony count of Breaking and Entering With Intent to Commit Larceny, one misdemeanor count of Entry Without Permission, and one felony count of Carrying a Concealed Weapon. (App. A)

2. On November 25, 2003, the Michigan Court of Appeals No. 241583, in an unpublished opinion, reversed the felony conviction of Breaking and Entering With Intent to Commit Larceny, ordering that a misdemeanor conviction of Breaking and Entering Without Permission be entered; affirmed the misdemeanor count of Entry Without Permission; and affirmed the felony count of Carrying a Concealed Weapon. (App. B)

3. On January 21, 2004, after Petitioner timely filed a motion for rehearing, the Court of Appeals denied said motion. (App. C)

4. The decision of the Supreme Court of Michigan (App. D) was entered on July 29, 2004 No.125769 and is published at ____Mich____, 683 N.W.2d 671, 2004 Mich. LEXIS 1600 (2004).

JURISDICTION

The Supreme Court of Michigan entered its decision on July 29, 2004. This court has jurisdiction pursuant to 28 U.S.C. Section 1257.

STATUTORY PROVISIONS INVOLVED

Carrying a Concealed Weapon in violation of MCL 750.227(2). That statute provides as follows:

> A person shall not carry a **pistol** concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, **except in his or her dwelling house**, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restriction upon said license. [Emphasis supplied.]

The term "pistol" is defined, pursuant to MCL 750.222(c), as follows:

> "Pistol" means a **firearm**, loaded or unloaded, 30 inches or less in length, or any firearm, loaded or unloaded, which by its construction and appearance conceals it as a firearm. [Emphasis supplied.]

To support a conviction for carrying a weapon in a vehicle the prosecutor must show: 1) The presence of a weapon. . . . MCLA Sec 750.227(2)

> "The term "firearm" is defined by the legislature in MCL 750.222(B); MSA 2.212(20) which provide in pertinent part:
>
> > "Firearm", means a weapon from which a dangerous projectile may be propelled by an explosive or by gas or air. Firearm does not include any smooth bore Rifle or handgun designed and manufactured exclusively for propelling BB's not exceeding .177 calibre by means of spring, gas or air.

INTRODUCTION

This case involves the most bizarre situation in which Petitioner was convicted of the felony of carrying a concealed weapon even though (1) no weapon was recovered; (2) no one observed any weapon being fired; (3) there was no evidence that any weapon was being utilized; and (4) the only evidence that Petitioner possessed a weapon was in the form of testimony from a person who stated that she thought the Petitioner was in possession of a weapon but "was not positive."

The federal questions sought to be reviewed by this court have been raised since the origination of the criminal proceedings.

In the instant case, no weapon was placed into evidence and there was no testimony or other evidence establishing, beyond a reasonable doubt, that Petitioner had a pistol at the time that the only witness testified that she saw him place an object in the trunk of his automobile. No gun was recovered. The witness, herself, was not sure that Petitioner had a gun in his possession.

This case should never have been presented to a jury since the evidence proferred, as a matter of law, did not satisfy the threshold of guilt beyond a reasonable doubt. The lack of any physical evidence, combined with the testimony of the only witness in support of the charge that she was not positive that the object in Petitioner's hand was a gun, constitutes reasonable doubt, *per se.*

STATEMENT OF THE CASE

On February 14, 2001, a valentine was placed in the Adrian Daily Telegram and directed to "Travis" from "Penny." The next day, February 15, 2001, the valentine was seen by Linda Ballard, Petitioner's wife, while she was at the office where she worked for Petitioner. She made numerous telephone calls and gave every indication that she would not be returning. At the time, Petitioner was in Howell, Michigan in connection with a legal matter for which he was representing a client. Upon leaving the court in Howell, he spoke to his secretary and was told his wife had seen the valentine in the newspaper and had left the office. Petitioner then began making telephone calls trying to locate his wife. Thereafter, Petitioner became suicidal. He received a telephone call from Janet Harsh, who was opposing counsel in a case. Attorney Harsh began speaking to Petitioner about a legal matter when he told her that he was distressed by the fact that his wife had left him and that she had taken his children. He told her that he was contemplating suicide. Attorney Harsh then went to his home where she found Peti-

tioner threatening himself with what appeared to be a gun. He never threatened anyone with a gun, except for himself. Attorney Harsh testified that she felt sure that Petitioner would kill himself that night. She testified that when she saw him at his home, it was obvious that Petitioner had been crying, and that he was agitated and upset. Attorney Harsh further testified that he wanted to find his wife, Linda.

When Petitioner was unable to contact his wife and children after making numerous telephone calls from his home, he called his wife's cellular telephone and picked up the messages left on voice mail. One such message was from "Margaret", asking that a return call be placed. Petitioner recognized that voice as being Margaret Noe's. Mrs. Noe is a member of the staff of the Lenawee County Prosecuting Attorney who has a side practice representing persons in divorce cases.

Mrs. Harsh and Petitioner went around the City of Adrian looking for his wife. They went over to Mrs. Noe's home and Mrs. Harsh approached the home and upon spoke with Mrs. Noe's son, Charles. However, he did not know her whereabouts; neither did Mrs. Noe's husband, Bill.

Ms. Harsh testified that, upon returning to Petitioner's vehicle, she believed she saw Petitioner place an object in the trunk which she believed looked like a gun but that she was not positive.

Q. Did he ever tell you what it was he better put in the trunk?
A. No, he did not say I better put this gun in the trunk.
Q. And he didn't—he never showed you the object?
A. I could see it when he was putting it in the trunk.
Q. Well, he didn't—I'm saying he never showed it to you?
A. No. No, he didn't.
Q. He never held it up and say, here, look at this?

A. No, he didn't.
Q. Okay. But this gun, which you said fit in his hand, as he's taking—you're saying he took it out of his pocket and you could see what it was?
A. No, not right away. I could see him pulling something out of his pocket. It wasn't till he got around to the back of his car, because I was on the passenger side, that I could see what he was doing.
Q. You're on the passenger side. Which side is he on?
A. He was on the driver's side and then he walked to the back of the car.
Q. But did he ever come to the passenger side?
A. No.
Q. How long did the whole thing take?
A. The whole thing from?
Q. Walking to the back, opening the trunk or the trunk was open, presumably, if he's got one of those trunk releases in his car.
A. Well, he opened up the trunk. Probably less than a minute.
Q. Very quick?
A. I'd say it was pretty quick; it was less than a minute.
Q. Okay, and you said you saw an object in his hand; you say it looked like the gun, but you're not sure?
A. Yeah, it looked like the gun, but **I'm not positive.** [Emphasis supplied.]

That was the sole evidence regarding any alleged possession of a weapon away from Petitioner's residence. Ms. Harsh never testified that she observed any weapon being discharged and no one else testified about any weapons in Petitioner's possession away from his house.[1] There was no

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[1] A couple of police officers testified concerning some rifles which were in Petitioner's home. However, those rifles were not linked to anything in Petitioner's possession outside of his home. Petitioner was not charged with possession of the rifles.

evidence that any item in Petitioner's possession was, in fact, a firearm. No firearm was put into evidence. No firearm was seized by the police. There was no testimony as to any weapon's being discharged in any testing by the police and there was no evidence that any tests were performed with respect to any of the weapons which were in Petitioner's home. Upon being questioned at trial regarding Petitioner's possession of a weapon, Ms. Harsh testified that from the time she and Petitioner left Petitioner's house in his vehicle until the time that they stopped at Margaret Noe's house, she did not see a gun in his possession. She testified that she saw him put something into the trunk of his car which she said "looked like the gun, but I'm not positive." Attorney Harsh testified that while they were driving around the Adrian area, Petitioner was trying to find his wife.

REASONS FOR GRANTING THE PETITION

I. THIS CASE APPEARS TO BE ONE OF FIRST IMPRESSION INSOFAR AS IT INVOLVES CONVICTION ON A CHARGE OF CARRYING A CONCEALED WEAPON WHERE NO FIREARM WAS RECOVERED, WHERE NO ONE OBSERVED ANY FIREARM BEING DISCHARGED OR CLAIMED THAT ONE WAS BEING USED TO THREATEN ANYONE, AND WHERE THE ONLY EVIDENCE OF EXISTENCE AND/OR POSSESSION OF A FIREARM CAME FROM THE TESTIMONY OF A WITNESS WHO WAS NOT POSITIVE THAT SHE SAW A FIREARM.

In the instant case, no weapon was placed into evidence and there was no testimony or other evidence establishing, beyond a reasonable doubt, that Petitioner had a pistol at the time that the prosecution's witness testified that she saw him place an object in the trunk of his automobile. No gun was

recovered. The witness, herself, was not sure that Petitioner had a gun in his possession. The government cannot prevail in prosecution on the basis of jury speculation. *U.S. v. Wilson*, 160 F.3d 732, 333 U.S.App. D.C. 103, certiorari denied 120 S.Ct. 81, 528 U.S. 828, 145 L.Ed.2d 69 (D.C. Cir. 1998). Jury may not base a verdict on mere speculation. *U.S. v. Teffera*, 985 F.2d 1082, 300 U.S.App.D.C. 23 (D.C. Cir. 1993). Conviction for criminal offense cannot rest on mere suspicion. *U.S. v. Smith*, 82 F.3d 1564, appeal after remand 116 F.3d 857, certiorari denied 118 S.Ct. 256, 522 U.S. 903, 139 L.Ed.2d 183 (10th Cir. 1996).

No jury instruction was ever given notifying the jury or the petitioner that the court or prosecutor was placing any affirmative duty on petitioner relieving the prosecutor of his obligation to prove the required elements of the charge or imposing affirmative obligations upon petitioner as part of his defense.

The Michigan Court of Appeals noted, Harsh, herself, testified that "she was 'not positive' that it was a gun that defendant put in the trunk. . . " (Appendix C). The only evidence that the prosecution put forward in support of the claim that Defendant-Appellant was in possession of a pistol while driving his automobile was with respect to Harsh's observation of his putting an object in his trunk. No other evidence was presented regarding Petitioner's possession of a gun outside of his residence or curtilage thereof. It is submitted that Harsh's own disclaimer constitutes reasonable doubt as a matter of law. This is especially true since there is no other evidence showing that Petitioner possessed a pistol in his vehicle.

The statutory definition, set forth in MCL 750.222(a) (b), (c), requires that certain elements be established. In order to be a pistol, an object must be a "firearm." An object which is a "handgun designed and manufactured exclusively for propelling BB's not exceeding .177 calibre by means of spring, gas or air" is specially exempted from the definition of a

handgun. There was no testimony or other evidence showing that the object which Ms. Harsh observed was a handgun which satisfied the definition of a firearm under MCL 722(b). Even if Ms. Harsh was absolutely positive that the object she observed was a handgun, such would still be insufficient to meet the definition of firearm.[2]

Here, the paucity of evidence provided neither circumstantial evidence that Petitioner possessed a pistol nor permitted reasonable inference, since there was nothing upon which to make such inference.[3] For the jury to reject Petitioner's testimony and accept Janet Harsh's testimony, they still would be required to accept Harsh's concession of uncertainty that the item in question was a gun, thereby being left with a genuine doubt. Additionally, the jury was required to determine guilt without the statutory definition of a pistol's having been satisfied. This goes beyond a jury legitimate ability.

A conviction based on evidence that requires speculation or mere conjecture by jury is invalid. *U.S. v. Brown*, 763 F.2d 984, certiorari denied 106 S.Ct. 273, 474 U.S. 905, 88 L.Ed.2d 234 (8th Cir. 1985).

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[2] Perhaps the statutory definition under MCL 722(B), (C), explains why the defense has been unable to locate any reported Michigan cases involving conviction for Carrying a Concealed Weapon in the absence of a weapon's having been recovered or other evidence establishing the calibre and type of the projectile which the weapon is designed to propel, ire-spective of whether the weapon is or is not operable.

[3] Inferring that Defendant-Appellant was in possession of a pistol while driving his car would be no more appropriate than inferring that a person was in possession of heroin or cocaine simply because he was seen to be carrying a white powder in a bag, with nothing more. One might speculate that the white powder could be a controlled substance; however, standing by itself, such would not be sufficient to provide a basis for conviction because the composition of powder, not being known, would not satisfy the statutory definition of a controlled substance under MCL 333.7104. It could be nothing more sinister than powdered sugar or flour.

II. THE ISSUES IN THIS PETITION INVOLVE LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE UNITES STATES OF AMERICA'S JURISPRUDENCE INASMUCH AS IT CONCERNS KEY PROVISIONS OF THE UNITED STATES CONSTITUTION AND ITS IMPACT UPON THE CONCEPT OF REASONABLE DOUBT AND THE PRESUMPTION OF INNOCENCE IN A CRIMINAL TRIAL AND WHETHER THE DEFINITION, AS SET FORTH BY THE MICHIGAN LEGISLATURE, OF A NECESSARY ELEMENT OF A CRIME MUST BE SATISFIED AS A PRECONDITION TO ANY CONVICTION. AS SUCH THE PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS ARE AT ISSUE.

The Prosecution Failed to Produce Evidence from Which the Jury Could Find Guilt Beyond a Reasonable Doubt under Count III. Count III charged the Petitioner with Carrying a Concealed Weapon in violation of MCL 750.227(2). That statute provides as follows:

> A person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the in his or her dwelling ho person, except use, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restriction upon said license. [Emphasis supplied.]

The term "pistol" is defined, pursuant to MCL 750.222(c), as follows:

> "Pistol" means a firearm, loaded or unloaded, 30 inches or less in length, or any firearm, loaded or unloaded,

> which by its construction and appearance conceals it as a firearm. [Emphasis supplied.]

The term "firearm" is defined, pursuant to MCL 722(b), as follows:

> The word "firearm", except as otherwise specifically defined in the statutes, shall be construed to include any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion, except any smooth bore file or handgun designed and manufactured exclusively for propelling BB's not exceeding .177 calibre by means of spring, gas or air. [Emphasis supplied.]

Thus, the gravamen of the crime of carrying a concealed weapon is that the "weapon" must be a pistol, which is defined as a firearm, thirty (30) inches or less in length, which must be such that a dangerous projectile may be propelled from it using explosives, gas or air as a means of propulsion. If the object in question does not have such a quality, then by definition it is not a firearm, can neither be a pistol nor a pistol carried in an automobile, and thereby cannot constitute the basis of a prosecution under MCL 750.227(2).

The central issue with respect to the charge pf carrying a concealed weapon is whether the object which the witness, Janet Harsh, testified she saw the Petitioner put in his trunk, satisfies the definition of a "pistol" beyond a reasonable doubt.

Janet Harsh testified that she is not familiar with firearms. She stated that she has none at home and that neither she nor her husband ever used firearms. She testified that she did not focus much on the guns in Petitioner's home and that she did not want to look at the guns.

She stated that she saw two "guns" in the Petitioner's kitchen, one of which was considerably smaller than the other. While in Petitioner's home, she saw the Petitioner put the barrel of one of the guns to his temple and in his mouth.

She did not testify seeing any of the guns being fired. She did not testify whether she thought that either of these guns was capable of discharging a projectile as set forth in the statutory definition of "firearm." There was no testimony as to whether the guns in question were real or simulated. No gun was ever recovered. No gun was ever introduced into evidence. The totality of evidence as to the charge of carrying a concealed weapon is that Janet Harsh saw the Petitioner pull something out of his pocket, which at first she could not identify, and later thought that it looked like the small gun which she saw previously in Petitioner's house, but was not positive. She had testified that he had put it in his pocket and taken it out of his pocket, while in the house, on numerous occasions. There was no testimony from her that she was aware whether the gun was, or was not, in the Petitioner's pocket at the time they left his house to look for Petitioner's wife. Mrs. Harsh testified that Petitioner did not state what he was putting in the trunk. She stated that the object which Petitioner put in the trunk looked like the small gun, but she was not positive.

The foregoing is the entirety of the evidence which the prosecution produced for the charge of carrying a concealed weapon.

Under such circumstances, the testimony from the sole witness to possession of the "firearm" that she was "not positive" whether the object was a pistol constitutes reasonable doubt, *per se*.

In Michigan, "a 'pistol,' as defined [by the Legislature] under the concealed weapons statute, must be operable." *People v. Gardner*, 194 Mich App 652, 654 (1992). "The pistol must be capable of propelling the requisite-sized dangerous projectile or of being altered to do so within a reasonably short period of time." *People v. Parr*, 197 Mich App 41, 45 (1992). There was absolutely no evidence presented during the trial from which the trier of fact could

find whether, or not, the object which Ms. Harsh stated she observed being put in the trunk satisfied these criteria. As Ms. Harsh conceded, she was not positive as to what she saw. How does such testimony, which is the only evidence in support of Petitioner's possession of a pistol outside of his home, establish guilt beyond a reasonable doubt? If the only witness is not positive, reasonable doubt is established as a matter of law, unless there is some other evidence which supports a claim of possession beyond a reasonable doubt. But there is not! The sole witness, by her own admission, expressed a reasonable doubt as to whether Petitioner was in possession of a pistol at the rear of his automobile. With such a reasonable doubt express by that witness, the charge should have been dismissed prior to the jury's consideration of the same.

This evidence is simply insufficient, as a matter of law, to result in a conviction. Claim based on insufficiency of evidence raises a constitutional issue. U.S. Constitution Amend. V; *Buggs v. U.S.*, 153 F.3d 439 (7th Cir. 1998).

The concept of sufficiency, on the other hand, is designed to determine whether all the evidence, considered as a whole, justifies submitting the case to the trier of fact or requires judgment as a matter of law. . . Because there is no requirement that the evidence be sufficient to support a conviction to be admissible, it does not necessarily follow that merely because some evidence is admitted, the evidence is sufficient to raise a jury issue. In quantitative terms, the fact that a piece of evidence has some tendency to make the existence of a fact more probable, or less probable, does not necessarily mean that the evidence would justify a reasonable juror in reasonably concluding the existence of that fact beyond a reasonable doubt. To be sufficient, evidence supporting conviction must be "substantial"; that is, it must do more than raise mere suspicion of guilt. *Scrivner v. Tansy*,

68 F.3d 1234, certiorari denied 116 S.Ct. 1277, 516 U.S. 1178, 134 L.Ed.2d 223 (10th Cir. 1995). *U.S .v. Yoakam*, 116 F.3d 1346.(1997).*U.S. v. Leos-Quidada*, 107 F.3d 786.(10th Cir. 1997). *U.S. v. Garcia-Emanuel*, 14 F.3d 1469, denial of habeas corpus affirmed 141 F.3d 1186.(10th Cir. 1994). *U.S. v. Varoz*, 740 F.2d 772 (10th Cir. 1994.

The Michigan Supreme Court has recognized that the issue of sufficiency is of constitutional magnitude when involving conviction of a crime.

> Due process requires that the prosecutor introduce sufficient evidence which could justify a trier of fact in reasonably concluding that defendant is guilty beyond a reasonable doubt before a defendant can be convicted of a criminal offense. *Id.* See also *People v Herbert*, 444 Mich 466, 473 (1993); *People v Lemmon*, 456 Mich 625, 633-634 (1998).

As this Court stated almost 50 years ago in a case involving accusations of carrying concealed weapons in an automobile,

> Citation of authority is unnecessary to establish the principle that the defendant in a criminal case is presumed to be innocent, and in order to convict him of the crime charged it must be shown by proper evidence that his guilt is established beyond a reasonable doubt.

Here, a jury would have to speculate as to the object that Mrs. Harsh observed, since she, herself, testified that she was not positive that it was a gun. All she could say was that it looked like the small gun that Petitioner had in the house, but she was not positive. Looking like a gun but not being positive is hardly a basis upon which a reasonable trier of fact could conclude, beyond a reasonable doubt, that the object was, in fact, a "pistol." Moreover, "looking like a gun" does not establish whether the object meets the statutory definition of a pistol, or is a toy or simulated article. Evidence is legally insufficient to support conviction where jury is presented with theory of conviction that fails to come within statutory

definition of the crime. *U.S. v. Joseph*, 939 F. Supp. 26, affirmed 169 F.3d 9, 335 U.S. App.D.C. 93, rehearing and suggestion for rehearing denied, certiorari denied 120 S.Ct. 266, 528 U.S. 914, 145 L.Ed.2d 223 (D.C. Cir. 1996).

Here, the object in question is not in evidence. No one but Janet Harsh claims to have seen the object and even she was not positive as to what the object was.

It is a basic tenet of our criminal justice system that the prosecution must prove all elements of a crime beyond a reasonable doubt. *Fiore v. White*, 531 US 225, 121 SCt 712, 148 LEd2d 629 (3rd Cir. 2001); *Jackson v. Virginia*, 443 US 307, 99 SCt 2781, 61 LEd2d 560 (4th Cir. 1979); *In re Winship*, 397 US 358, 90 SCt 1068, 25 LEd2d 368 (N.E.2d 1970); *People v. Silver*, 466 Mich 386, 393 n. 7 (2002). Government is required to prove beyond reasonable doubt each element of crime. *U.S. v. Alvarez*, 972 F.2d 1000, certiorari denied 113 S.Ct. 1427, 507 U.S. 977, 122 L.Ed.2d 795, appeal after remand 21 F.3d 1116, certiorari denied 115 S.Ct. 215, 513 U.S. 881, 130 L.Ed.2d 143.(1992). Government may demonstrate dominion and control over object by proof of actual physical custody or constructive possession. *U.S. v. Castillo*, 866 F.2d 1071, rehearing denied, denial of habeas corpus affirmed 972 F2d 1337 (9th Cir. 1998).

Conviction requires sufficient evidence to support all necessary elements of crime. *U.S. v. Thomas*, 8 F.3d 1552 (11th Cir. 1993).

State has burden of providing each and every element of offense beyond reasonable doubt.

> *Fairchild v. Norris*, 869 F.Supp. 672, reversed 21 F.3d 799, rehearing and suggestion for rehearing denied, certiorari denied 115 S.Ct. 1092, 513 U.S. 1146, 130 L.Ed.2d 1061, rehearing denied 115 S.Ct. 1726, 514 U.S. 1078, 131 L.Ed.2d 583, rehearing denied 51 F.3d 129, certiorari denied 115 S.Ct. 2562, 515 U.S. 1134,

132 L.Ed.2d 815(1993). *U.S. v. Meraz-Solomon*, 818 F.Supp. 1320, affirmed 3 F.3d 298.(S.D. Cal. 1992)

Prosecution always bears burden of proving beyond reasonable doubt specific elements of crime charged or of lesser included offenses. *U.S. v. Skodnek*, 896 F.Supp. 60.(1995)

The prosecutor's obligation to meet its burden of proof is merely one of the rules designed to bring about a fair verdict. This court has held that, in a criminal trial on the merits, defendants are entitle to a strict observance of all the rules designed to bring about a fair verdict. *Costello v United States*, 350 US 359, 76 S Ct 965, 100 L. Ed 397. (2nd Cir. 1956)

Inasmuch as no firearm was recovered; no evidence was set forth by the prosecution as to whether the object in question satisfies the statutory definition of a "firearm." The only witness to purport that Petitioner was carrying a firearm in his automobile was not positive as to whether the object which she claims to have seen was, in fact, a gun, and she was therefore unable to provide evidence as to whether the object in question constituted a "firearm" as defined by Michigan's Legislature. Accordingly, there was insufficient evidence to permit a conviction on Count III. For this reason, the jury's verdict on Count III should be vacated and that count dismissed with prejudice.

CONCLUSION

For the reasons stated in this Petition for Writ Of Certiorari, the decision of the Court of Appeals affirming the felony count of Carrying a Concealed Weapon is a denial of petitioner's Constitutional Right to the presumption of innocence and has and will continue to cause material injustice if allowed to remain.

It is respectfully requested that this Honorable Court grant this Petition for Writ Of Certiorari, reverse so much of the

decision of the Court of Appeals as affirms the conviction for Carrying a Concealed Weapon, granting petitioner such other and further relief as may be deemed appropriate.

The petition for certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

October 25, 2004

APPENDICES

APPENDIX A

MICHIGAN SUPREME COURT

SC: 125769

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

TRAVIS WILLARD BALLARD,
Defendant-Appellant.

Entered: July 29, 2004

ORDER

On order of the Court, the application for leave to appeal the November 25, 2003 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

APPENDIX B

SUPREME COURT OF MICHIGAN

SC: 125769

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

TRAVIS WILLARD BALLARD,
Defendant-Appellant.

July 29, 2004, Decided

OPINION

On order of the Court, the application for leave to appeal the November 25, 2003 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

APPENDIX C

STATE OF MICHIGAN COURT OF APPEALS

UNPUBLISHED
November 25, 2003

No. 241583
Lenawee Circuit Court
LC No. 01-009495-FH

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

TRAVIS WILLARD BALLARD,
Defendant-Appellant.

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for breaking and entering with intent to commit larceny, MCL 750.110, entry without permission, MCL 750.115, and carrying a concealed weapon (CCW), MCL 750.227. The trial court sentenced defendant to nine months in jail for the breaking and entering with intent to commit larceny conviction, ninety days in jail for the entry without permission conviction, and nine months in jail for the CCW conviction. We affirm defendant's entry without permission and CCW convictions, but reverse defendant's breaking and entering with intent to commit larceny conviction and remand for entry of a judgment for the lesser included offense of breaking and entering without permission.

I. Facts and Procedure

On February 15, 2002, defendant, who was an attorney, called his secretary from a hearing in Howell. Defendant's secretary told him that his wife, Linda Ballard, who also worked in defendant's office managing finances, had taken some boxes of files and left the office after seeing a valentine addressed to defendant from another woman in the newspaper. After trying unsuccessfully to contact Linda, defendant drove home. When defendant arrived home, neither Linda nor their children were there. At this point, Janet Harsh, an attorney who was the opposing counsel to defendant on a case, called defendant. Defendant was suicidal because he thought his wife had taken the children and was going to leave him. Because of defendant's condition, Harsh went to defendant's house, where defendant was handling two guns and contemplating suicide. By listening to Linda's voice mail messages, defendant discovered that Margaret Noe, a divorce lawyer, had called Linda. After unsuccessfully trying to contact Noe by phone, defendant and Harsh decided to look for Noe. Defendant testified that when he got into his car, he felt a gun in his pocket and decided to put the gun into the saddlebag of his motorcycle. Defendant testified that, as he was putting the gun in the saddlebag, he told Harsh, "I better not have this." After defendant left, defendant's father retrieved a gun from the saddlebag and put it in the trunk of his own car.

At one point when defendant and Harsh were looking for Noe, they stopped at Noe's house to see if she was there. The trunk opened[1] and Harsh saw defendant transfer what looked like a small gun from his pocket to the trunk of his car and say, "I better put this away." Harsh testified that she was not positive that it was a gun she saw in defendant's hands, but

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[1] Defendant testified that, because of his size, he frequently opened the trunk of his car by accidentally triggering the trunk release with his knee.

that "it looked like a gun." Because Noe was not home, defendant and Harsh went to her office. When they arrived at about 8:00 p.m., a light was on in the office and a car, which defendant thought belonged to Noe, was parked in the lot. Defendant parked his car, left it running with the headlights shining into the office, walked up to the front door (the public entrance), opened it, called Linda and Noe's names, and walked in.[2] Despite the fact that defendant did not see anybody in the office, he proceeded to open the door to Noe's private office and went in. Inside Noe's office, defendant recognized the boxes from his office that Linda had taken. Defendant testified that he took the boxes because they contained confidential records belonging to his clients. Defendant also opened one of the desk drawers to look for the backup tapes for his computer. When he did not find it, defendant took two boxes and carried them to his car. He then reentered the office and took two more boxes and a bag of documents from Noe's office to his car. Defendant and Harsh then drove around for a while looking for Linda's car, but did not find it and returned to defendant's house.

After visiting Noe's office, defendant called Noe's husband and told him that he had entered Noe's office, taken the boxes of files, and was burning them. When Noe found out from her husband that defendant had been to her office, she went to her office. As she was going in, she noticed that the lock on the door to the private entrance had been "jimmied" and called the police. Inside, Noe found that the shopping bag and boxes of files Linda had brought in were missing. She also noticed that the papers on her desk were mixed up, one of the drawers was open, and her phone had been moved. Later, she

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[2] The last person to leave Noe's office that night testified that the doors to the office were locked when she left and that the only light that was left on was a nightlight by the public entrance.

discovered that several other miscellaneous documents were missing.[3]

Meanwhile, defendant was at home burning folders to trick Linda into believing that he had burned the records. When the police began to gather outside of defendant's house, defendant called Ric Hooten to go in his house and take the guns from his motorcycle saddlebag and the kitchen and put them in his safe in the basement. Hooten found one gun and put it in the safe, but he did not find a gun in the motorcycle saddlebag.

Defendant was charged with breaking and entering with intent to commit larceny for his first entry of Noe's office through the front door, entry without permission with intent to commit larceny for his second entry of Noe's office through the front door,[4] and CCW for carrying a pistol in the trunk of his car. The jury convicted and sentenced defendant as outlined above.

II. Sufficiency of the Evidence

Defendant argues that there was insufficient evidence to support his convictions for CCW and breaking and entering with intent to commit larceny. In reviewing a claim of insufficient evidence, this Court must determine whether, taking the evidence in the light most favorable to the prosecution, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). Circumstantial evidence and reasonable inferences that arise from the evidence

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[3] These missing documents included a rough draft of a midterm examination Noe was preparing to give to her business law students, a piece of paper with the Ballards' full names and dates of birth, and the contents of a file concerning one of Noe's clients.

[4] The jury acquitted defendant of the charge of entry without permission with intent to commit larceny, but convicted him of the lesser included offense of entry without permission.

can constitute sufficient proof of the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

A. Carrying a Concealed Weapon

Defendant first argues that the evidence presented at trial was insufficient to support his CCW conviction because there was insufficient evidence to prove the presence of a weapon in his vehicle. We disagree. To support a conviction for carrying a concealed weapon in a vehicle, MCL 750.227(2), the prosecution must show: "(1) the presence of a weapon in a vehicle operated or occupied by the defendant, (2) that the defendant knew or was aware of its presence, and (3) that he was 'carrying' it." *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999). Defendant argues that, in addition to the elements set forth in *Nimeth*, the prosecution should also have to prove that the pistol was operable in order to convict defendant. However, this Court has held that it is the defendant's burden to prove that the pistol was *not* operable: "An affirmative defense to carrying a concealed pistol can be made by the presentation of proof that the pistol would not fire and could not readily be made to fire." *People v Gardner*, 194 Mich App 652, 655; 487 NW2d 515 (1992). Here, because defendant argued at trial that was not carrying a pistol, he presented no evidence at trial that the alleged gun was inoperable. Therefore, the jury was entitled to conclude that the pistol was operable. *People v Parr*, 197 Mich App 41, 45; 494 NW2d 768 (1992).

Defendant also argues that the evidence was insufficient to show that he was carrying a pistol in his car. Both defendant and Harsh agree that defendant got out of the car and removed the gun from his pocket. However, Harsh testified that it happened at Noe's house, and defendant testified that it happened in his garage, before they left his house. Although the testimony of defendant and Harsh differed about whether defendant had the gun while he was driving his car, and Harsh testified that she was "not positive" that it was a gun

that defendant put in the trunk, issues of witness credibility are for the jury, absent exceptional circumstances. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). In further support of the jury's conclusion that defendant was carrying a gun, Harsh testified that before defendant put the gun in the trunk, he said, "I better put this away." "This Court will not interfere with the role of the trier of fact of determining the weight of the evidence or the credibility of witnesses." *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003). "[A]ppellate courts of this state refuse to interfere with jury verdicts where sufficient although weak evidence has been presented." *Cassette v General Motors Corp*, 73 Mich App 225, 228; 251 NW2d 275 (1977), citing *Tuttle v Dept of State Highways*, 397 Mich 44, 46-47 n 3; 243 NW2d 244 (1976). While Harsh admitted she was not positive that what she observed defendant put in the trunk was in fact a gun, she believed that it was in fact a gun. Further, Harsh was not equivocal that defendant said, "I better put this away" before going to the trunk that defendant alleges was opened accidentally. The jury was free to reject defendant's testimony and conclude that Harsh was correct in her belief that defendant possessed a gun while driving his car outside the curtilage of his home. We conclude that, viewed in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant knowingly carried a concealed weapon in his vehicle.

B. Breaking and Entering With Intent to Commit Larceny

Defendant also argues that there was insufficient evidence to support his breaking and entering with intent to commit larceny conviction. Specifically, defendant argues that there was insufficient evidence of his intent to commit larceny. "The elements of breaking and entering with intent to commit larceny are: (1) the defendant broke into a building, (2) the defendant entered the building, and (3) at the time of the

breaking and entering, the defendant intended to commit a larceny therein." *People v Cornell*, 466 Mich 335, 360-361; 646 NW2d 127 (2002). "Intent to commit larceny cannot be presumed solely from proof of the breaking and entering. However, intent may reasonably be inferred from the nature, time and place of defendant's acts before and during the breaking and entering." *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988) (citations omitted).

In the present case, both defendant and Harsh testified that defendant went to Noe's office for the purpose of looking for Linda. However, at the time they went to Noe's office, defendant knew that Linda had taken boxes of files from their office and had contacted Noe, who he knew was a divorce lawyer. Therefore, a rational juror could assume that defendant believed that there was a chance that Linda had taken the boxes of files to Noe's office, and that defendant had entered Noe's office with the intent to retrieve those files.

However, even if defendant entered Noe's office with the intent to retrieve the boxes of files, such intent does not constitute intent to commit larceny if the files belonged to him and he had the right to their possession. "Larceny requires an intent to take and carry away someone else's property without that person's consent." *People v Pohl*, 202 Mich App 203, 205; 507 NW2d 819 (1993), remanded on other grounds 445 Mich 918 (1994). For purposes of the crime of larceny, the property must be taken from a person who holds title to that property or has rightful possession and control of the property. *People v Sheldon*, 208 Mich App 331, 334; 527 NW2d 76 (1995). In other words, the "owner" of the property means the actual owner of the property or any other person whose consent was necessary before the property could be taken. *Id.*, citing CJI2d 22.2.

> "[I]f the defendant in good faith believed that the [property] . . . was his . . . . *and that he was entitled to its possession*, he could not be guilty of . . . larceny in

> taking it, because there would be no felonious intent, 'and if the defendant, for any reason whatever, indulged no such intent, the crime cannot have been committed.' " *People v Holcomb*, 395 Mich 326, 333; 235 NW2d 343 (1975) (emphasis added), quoting *People v Walker*, 38 Mich 156 (1878). [*Pohl, supra* at 205-206.]

Here, there is no evidence, circumstantial or otherwise, that defendant entered Noe's office with the intent to take anything other than the boxes of files that Linda had taken from their office.[5] Because defendant had rightful possession to these boxes of files, he could not have had any felonious intent when he entered Noe's office with the intent to take them.[6] Therefore, the evidence was insufficient to show that defendant entered Noe's office with intent to commit larceny and his conviction for breaking and entering with intent to commit larceny must be reversed.[7]

When the evidence is insufficient to support a conviction for the greater offense, an appellate court may remand for entry of judgment of a necessarily included lesser offense.

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[5] Noe testified that several miscellaneous documents were missing from her office, but there is no evidence that defendant even knew of the existence of these documents before he entered or that he entered the office with the intent to take these documents.

[6] This case is distinguishable from situations where the defendant, although the rightful owner of the property, had no right to possession of the property when the alleged larceny occurred. *See Sheldon, supra* at 336 (the defendant committed larceny when he took his vehicle from the impound lot before paying the required fees or posting a bond); *Pohl, supra* at 208 (the defendant committed breaking and entering an occupied dwelling with intent to commit larceny when he broke into the marital home and took his own property when he knew there was a court order that prohibited him from entering the marital home and removing his own property).

[7] Because we reverse defendant's conviction for breaking and entering with intent to commit larceny, we need not address defendant's other argument regarding this count.

People v Bearss, 463 Mich 623, 631; 625 NW2d 10 (2001). This remedy is available in cases " 'when a conviction for a greater offense is reversed on grounds that affect only the greater offense.' " *Id.*, quoting *Rutledge v United States*, 517 US 292, 306; 116 S Ct 1241; 134 L Ed 2d 419 (1996). Breaking and entering without permission, MCL 750.115,[8] is a lesser included offense of breaking and entering with intent to commit larceny. *Cornell, supra* at 360. Here, although defendant is correct that there is insufficient evidence that he had the intent to commit larceny when he entered Noe's office, defendant does not dispute that there was evidence supporting the breaking and entering without permission elements of the offense. Therefore, we remand to the trial court for entry of judgment for breaking and entering without permission, MCL 750.115, and for resentencing.

III. Jury Instructions

Next, defendant argues that the trial court erred in failing to instruct the jury regarding the statutory exception to the charge for entry without permission. As an initial matter, we conclude that defendant failed to properly preserve this issue for appeal. "A party may assign as error the giving of or the failure to give an instruction only if the party objects *on the*

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[8] We recognize that both the offense of breaking and entering without permission and the offense of entering without permission are governed by the same statutory section, MCL 750.115(1), and have the same punishment. The difference is that a suspect may not be convicted of entering without breaking if the entry was open to the public, unless the entry was expressly denied. MCL 750.115(2). In Issue III, *infra*, defendant argues that the trial court erred in failing to instruct the jury regarding this statutory exception to the charge that defendant entered without permission (Count II). However, in challenging defendant's conviction for breaking and entering with intent to commit larceny (Count I), defendant does not challenge the breaking and entering elements of the offense and, thus, the statutory exception does not apply. For purposes of clarity, we differentiate between the offense of breaking and entering without permission and the offense of entering without permission.

record before the jury retires to consider the verdict . . . ." MCR 2.516(C) (emphasis added). Defendant objected on the record to the trial court's failure to give this instruction only after the jury retired for deliberations.[9] Therefore, this issue is reviewed for plain error affecting defendant's substantial rights. *People v Gonzalez*, 468 Mich 636, 642-643; 664 NW2d 159 (2003).

Defendant argues that the trial court should have instructed the jury that he could not be found guilty of entry without permission if the office was open to the public when he entered, as provided in MCL 750.115(2). The entry without permission statute, MCL 750.115, provides, in pertinent part:

> (1) Any person who breaks and enters or enters without breaking, any . . . office . . . without first obtaining permission to enter from the owner or occupant, agent, or person having immediate control thereof, is guilty of a misdemeanor.
>
> (2) Subsection (1) does not apply to entering without breaking, any place which at the time of the entry was open to the public, unless the entry was expressly denied. . . .

In *People v McKinney*, 258 Mich App 157, 162-163; ___ NW2d ___ (2003), this Court set forth the standard for reviewing jury instructions:

> Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). It is the function of the trial court to clearly present the

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[9] From the context of defendant's objection, it appears that defendant might have requested this instruction earlier in the proceedings. However, neither defendant's earlier request for this instruction nor an earlier objection to the trial court's refusal to give the instruction were made on the record.

> case to the jury and instruct on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Accordingly, jury instructions must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). "The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court." *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

Here, defendant's entry without permission conviction stemmed from his second entry into Noe's office. When defendant went through the main entrance and the doorway of Noe's private office for the second time, he knew that the office was unoccupied and that Noe was not in her private office. Nonetheless, he entered the office and went back into Noe's private office to retrieve the rest of the boxes of files. These facts do not support the theory that defendant believed that the office building, including Noe's private office, was open to the public when he entered for the second time. Therefore, we conclude that the trial court did not commit a plain error that affected defendant's substantial rights by refusing to give a jury instruction regarding MCL 750.115(2).

IV. Prosecutorial Misconduct

Finally, defendant argues that he was denied a fair trial by prosecutorial misconduct. We review claims of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Because defendant failed to preserve his allegations of prosecutorial misconduct, our review regarding this issue is for plain error that affected defendant's substantial rights. *Id.* We will not find error requiring reversal where a curative instruction could have alleviated any prejudice. *Id.* at 449.

Defendant first argues that the prosecutor attempted to shift or change the burden of proof during his closing argument by stating that he did not have to prove that defendant attempted to break into Noe's office building through the private entrance. "The prosecutor may not suggest in closing argument that defendant must prove something or present a reasonable explanation for damaging evidence as this argument tends to shift the burden of proof." *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989), overruled in part on other grounds *People v Fields*, 450 Mich 94, 115 n 24; 538 NW2d 356 (1995). However, the prosecutor's statement did not change or shift the burden of proof with regard to the crimes charged. In fact, the prosecutor's statement that he did not have to prove that defendant entered Noe's office building through the private entrance was correct, because defendant was not charged for breaking into this private entrance—he was only charged for his entry into the front public entrance of the office. The prosecutor raised the evidence that the private door lock had been "jimmied" in order to help prove defendant's intent to commit larceny by showing that he or somebody else at his behest had earlier entered the office through the private entrance to see what was in the office. Prosecutors are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). The prosecutor did not have to prove beyond a reasonable doubt the theory that defendant had entered the private door earlier in the night because defendant was not charged with a crime for allegedly committing this act. Furthermore, the trial court properly instructed the jury that defendant is presumed to be innocent and that the prosecution must prove defendant's guilt of the crimes charged beyond a reasonable doubt. The trial court also instructed the jury that the lawyers' statements are not evidence. These instructions dispelled any prejudice caused by the prosecutor's statements. *Id.* at 721-722.

Defendant also argues that the prosecutor engaged in misconduct by telling the jury to convict defendant based on his character and for ruining Harsh's reputation and career. During his closing argument, the prosecutor made the following relevant statements:

> And the saddest case, probably, Janet Harsh. What do you think her professional life is going to be like in this county from now on and why?
>
> * * *
>
> Ms. Harsh was acting out of the kindness of her heart for someone who she thought was in great despair and who wasn't. He was using her. She's done in this county. I mean, yeah, she can still go on about her business, but she testified she is not treated the same as other lawyers, she does not have the same privileges as other lawyers. Because she's been painted forever by this. And why? Because she tried to help this guy. And what does he do in return? Ruins her. Why? Because that's the kind of person he is, and that's why he's here today. That's why he's on trial and that's why he should be convicted.
>
> There are givers in this world and there are takers in this world. Clearly, he's a taker, but he's more than a taker; he's a destroyer. Anybody who comes in contact with him gets destroyed.
>
> We've heard all sorts of medical terms, all of his maladies, all of these things that might be wrong with Travis Ballard. There's a non-medical term; he, quite simply, is a spoiled brat. He has spent his whole life having his own way with everything. And he's got all the biggest and the best toys. He's got the biggest handgun ever made. He's got the nicest gun collection anybody's ever seen. He's got his Cadillac STS. And all these other people that come into contact with him and their lives get ruined, oh, that's just too bad.

But the day has come now. The time has come for Mr. Ballard to finally be held accountable for his actions. Thank you.

Assuming, without deciding, that the prosecutor's arguments were improper, we nevertheless conclude that defendant has failed to show that he was prejudiced by these comments or that the outcome of the trial would have been different. The trial court instructed the jury that the lawyers' statements are not evidence and that the facts of the case should be decided from the evidence. Furthermore, the evidence supported defendant's convictions for two counts of entering without permission and CCW. Defendant has not shown that the jury would have acquitted him of these charges had it not been for the prosecutor's comments during his closing argument.

V. Conclusion

Defendant's conviction for breaking and entering with intent to commit larceny is reversed and the matter is remanded to the trial court for entry of a judgment for the lesser included offense of breaking and entering without permission. Accordingly, resentencing is required. Defendant's convictions for entry without permission and CCW are affirmed.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio

APPENDIX D

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF LENAWEE

File No. 01-9495 FH
HON. EDWARD J. GRANT
(By Assignment)

THE PEOPLE OF THE STATE OF MICHIGAN,

vs.

TRAVIS WILLARD BALLARD,
Defendant.

JUDGMENT OF GUILTY VERDICT JURY

At a session of said court held at the Rex B Martin Judicial Building in the City of Adrian, County of Lenawee, on the 8th day of March, 2002.

PRESENT: HONORABLE EDWARD J. GRANT, Circuit Judge

The Defendant having been tried by a jury on the charges of:

Count I—Breaking & Entering with Intent to Commit Larceny

Count II—Breaking & Entering—Entry without Breaking with Intent

Count III—Weapons—Carrying Concealed

and a verdict having been rendered, a judgment is hereby entered to the following:

COUNT I—GUILTY AS CHARGED

COUNT II—GUILTY of the lesser included offense of ENTRY WITHOUT PERMISSION (750.115)

COUNT III—GUILTY AS CHARGED

/s/ Edward J. Grant
EDWARD J. GRANT, Circuit Judge
By Assignment

Signed: March 8, 2002